

FEBRUARY 2. 1796.

3

ANS. *Robert Stewart, Esq;*

TO

PET. *William Heron.*

Wm. Beveridge, W. S. *Agent.*
H.

A N S W E R S

F O R

ROBERT STEWART, Esq; of St Ford, and JOHN
GREIG, his Tenant in Hay's Mill,

T O

The PETITION of WILLIAM HERON, Tenant of the
Lands of Cruivie.

IN the plan annexed to the petition, the depth and dimensions of the mill-lead, and of the different drains, are accurately enough stated. But it is so far defective, as it does not distinguish the several properties contiguous to the mill-lead; and it represents the different places merely as they now are, without attending to the progressive alterations which they have lately undergone. When those circumstances are fully under the view of the Court, the interlocutors of the Lord Ordinary will appear to be liable to no objection.

From the *intake*, as it is called, on the west or upper side of the grounds for more than a quarter of a mile, the mill-lead in question

A

runs

runs between the lands of Kinneir, lately belonging to Mr Macdonald, on the north, and those of Cruivie, belonging to Mr Anstruther, and possessed by the petitioner, on the south.

Farther down, on the north, are the lands of St Ford, belonging to the respondent, and on the south the lands continue to belong to Mr Anstruther, till within a very short space of Hay's Mill, nearly, it is thought, opposite to N 9. on the engraved plan, where the respondent, Mr Stewart, has the property on both sides of the mill lead. But this is a very small angle; and immediately after passing the Mill, Mr Anstruther's lands of Cruivie again reach the mill-lead on the south.

The whole grounds thus described are naturally very much upon a level, the fall, as appears from the surveyor's notes on the engraved plan, being just sufficient to make the water descend; and the mill-lead, so far as can be discovered, has remained in its present situation for many centuries.

Drain made by
Robert Edie in
1722.

About the year 1722, Robert Edie, who was tenant in the lands of Cruivie, made what was called the *land flank*, running in the same line with what is now called the *main drain*. Indeed the latter is just an extension of the former, both in wideness and depth. Robert Edie's view was, partly to prevent the water which descended from the higher grounds on the south from overflowing his meadow at Cruivie, and partly to receive the water from three cross ditches, which were at the same time made by him.

This land flank, as it was called, was very narrow, in some places a person could easily step over it; and its depth was also inconsiderable, inasmuch that, from a natural rising of the ground, nearly where the fourth cross ditch from the westward now is, hardly any water could pass by it from the higher parts of Cruivie Inch down to the lower grounds.

The cross ditches made by Robert Edie were in the same line with the three marked on the plan as nearest the intake, but they were very inconsiderable both in depth and wideness, being intended, as much as possible, to prevent the water in ordinary seasons from covering the higher parts of Cruivie Inch; and to prevent any danger to the mill-lead, the most solid part of the ground was chosen for the purpose. Great care too was taken to prevent any communication between the water at the intake and the land-flank, a considerable space being left between the two.

These

These circumstances are altogether omitted in the petition.

It is in evidence, and the petitioner lays great stress upon it, that after those cross ditches were dug by Robert Edie, some breaches were made from time to time in the margin of the mill-lead, nearly where the cross ditches were. But it will be observed, that while the land-stank continued in its original state, although the surplus water might, in consequence of those breaches, overflow Cruvie Inch, or the upper end of it, it naturally subsided, as soon as the flood which occasioned it was over, and run as before in its accustomed channel; and at no period did the water entirely leave the channel of the mill-lead itself. Indeed the thing was impossible, from the circumstances which have been already stated.

Accordingly your Lordships have seen, from the evidence quoted by the petitioner, that the breaches in Robert Edie's time were easily repaired;—sometimes by the miller himself, and at other times Robert Edie, and after him his son, gave some assistance, partly out of good neighbourhood, and partly to 'keep the water off their grounds;' and no dispute either did or could reasonably arise between them and the tenants of the mill. Robert Edie, p. 3.
G H.

On this footing matters remained till about the year 1782, the lands of Cruvie being all the while possessed by Robert Edie, already mentioned, and his son, who has been examined as a witness in the present question.

Mr Anstruther became proprietor of the lands of Cruvie in the year 1782. Being desirous to drain Cruvie Inch, he applied to the respondent John Greig, for the purpose of buying the right of the mill-lead itself; without which, he foresaw he could do nothing effectually. At this time, Captain Duncan, late of Craigton, was proprietor of St Ford, who did not chuse to part with the mill. And in this manner the treaty became unsuccessful. Drains made by
Mr Anstruther be-
tween 1782 and
1787.

Being disappointed in this attempt, Mr Anstruther endeavoured to drain his lands of Cruvie, as far as it was possible for him to do, without affecting the interests of the proprietor, or tenant of the mill. And your Lordships will carefully attend to Mr Anstruther's proceedings, which are altogether omitted in the petition; because the contrast between them and the petitioner's operations must at once satisfy your Lordships, how rathly and improperly the petitioner has acted.

Mr

Mr Anstruther began with altering what was called the land stank, which, at the time of his purchase, could neither effectually discharge the whole water coming from the higher grounds on the south, nor that which collected itself within Cruivie Inch. He therefore made it in many places from eight to nine feet deep, and the breadth was, in some places, enlarged to twelve feet, so that the water collected in those grounds descended readily to the mill-lead, which it joined a little below the mill.

Mr Anstruther also dug other two cross-ditches, being the fourth and fifth from the intake; but he was careful, that these ditches should not, in any place, approach too near the mill-lead, and that they should also be dug where the ground was most solid, so as to prevent any danger from a communication between them and the mill-lead.

It is said, that those proceedings met with no interruption, either from the proprietor of St Ford, or from his tenant in the mill. And the fact is undoubtedly true, but the reason of it is obvious.—While the mill-lead was allowed to remain in its original state, neither the proprietor, nor the tenant in the mill, had any title to enquire what the neighbouring proprietors were doing, for draining their own lands; and if the petitioner had only followed Mr Anstruther's example, the present question would not have occurred.

It may also be observed, that after Mr Anstruther had completed his operations on the land-stank, and upon the cross ditches, he began to make another ditch, parallel to the mill-lead, but at a considerable distance from it. But, after making some progress, being afraid of making a communication between the mill-lead and the cross ditches, he desisted. The remains of this ditch are marked on the engraved plan. It is called, 'Mr Anstruther's old ditch.'

Drains made by
the petitioner, Wil-
liam Heron.

John Walker,
p. 29. G, H.

The petitioner, William Heron, became Mr Anstruther's tenant in 1787. His first step was to make the land-stank both wider and deeper than Mr Anstruther had done; and this he dignified with the name of the main drain. He then widened and deepened the cross ditches, which communicated with the main drain. In general, as appears from the engraved plan, their depth was from *three* to *four* feet, and as the depth of the mill-lead itself is never more than *three feet*, and in most places not more than *two feet*, and in some places not more than *ten inches*

inches deep, it will readily occur, that if any communication took place between the mill-lead and the cross ditches, the whole water from the former, instead of serving the purposes of the mill, would be carried away from it by the cross ditches to the main drain, which, as your Lordships will see from the engraved plan, terminates at a place considerably below the mill itself.

These operations, therefore, were in their own nature attended with great risk; and although the petitioner now affects to say, that he proceeded without any apprehension of the consequences; it is proved, that John Mack, one of the tenants of St Ford, as well as the respondent John Greig, informed him, that he would do irreparable mischief, both to the lands of Cruvie, and to the mill-lead.

x Maps. Not satisfied, however, with these operations, the petitioner undertook to do a thing attended with still more danger. This was to make another ditch parallel to the mill-lead, beginning at the intake, and proceeding downwards as far as Cruvie Inch extends. This parallel, or side ditch, as it is called, is in general only seven or eight feet from the mill-lead; and the cross-ditches were so lengthened, as to communicate with it. And in this way, your Lordships see nothing was left to prevent the water of the mill-lead from going into the cross ditches, but a column of earth, in some places only about seven feet broad. Even if this had been solid, it is evident, that it would not have been sufficient for resisting the body of water which run in the mill-lead, in times of flood. But the nature of the ground, which was quite a marsh or bog, rendered it no protection at all. It is in evidence, that when the people were at work in making the side ditch, they were obliged to stand upon boards or planks, as the ground would not bear their weight; and the stuff or mud below the surface was collected with *cleeks* or *banks*, as they are called, being too soft to be moved with the spade.

Robert Edie depones, ' That the ground where the lead runs, Proof, p. 1. E.
' and where the new ditch is cast for a considerable space on both
' sides of the head of the cross ditch, was such a swamp or bog
' before the ditch was cast, that it would scarcely carry a man
' upon it.'

James Walker, after visiting the subjects, ' depones, That he — P. 5. E, F.
' tried the depth of the swamp, or marshy ground, with his staff, in

‘ the bottom of the ditch, by putting down its whole length ; but
 ‘ could not find the bottom.’

Proof, p. 7. A.

John Mack ‘ depones, That in casting said ditch, (meaning
 ‘ the side ditch), in the swampy ground, the people stood upon
 ‘ deals, or some such thing, as the ground would not bear them ;
 ‘ and he saw them also drawing the moss or mud to them, with
 ‘ hanks or cleeks in making the ditch : That the first time the
 ‘ deponent saw them casting the said ditch in that swamp, he told
 ‘ them, that he was certain they would play mischief, as they
 ‘ would carry or divert the water from the mill-lead.’

— p. 9. B.

Robert Laing, who was employed, with several other persons,
 to cast the side ditch, depones, ‘ That when the deponent and
 ‘ Crombie were employed at casting at said piece of the ditch,
 ‘ the pursuer John Greig came to them, when the defender was
 ‘ with them : That the said John Greig seemed to be in a passion ;
 ‘ but the deponent does not recollect what he said, only he seem-
 ‘ ed to be very much dissatisfied about the casting of the ditch.’

— p. 4. E.

Robert Edie, who had been so long a tenant in Cruivie, also
 ‘ depones, That if he had known the defender’s intention to
 ‘ make the said new or side ditch, he would have advised him
 ‘ against it, on account of the danger of taking away the water
 ‘ from the mill-lead.’

This side ditch was completed in summer 1798, and as soon as
 the wet season began, the water forced its way from the mill-
 lead, at a place nearly opposite the fourth cross ditch. After un-
 dermining the side ditch, it carried away the skin or surface ; and
 from thence, after occasioning a breach *fifty-nine feet* wide, as ap-
 pears from the engraved plan, it went in an angular direction into
 the fourth cross ditch, and immediately almost the whole water in
 the mill-lead, instead of pursuing its ordinary course, found its
 way by the cross ditch to the main drain, so as to deprive the
 miller of the opportunity of accommodating, either those who
 were thirled to the mill, or his general customers.

In the petition it seems to be doubted, Whether those mischiefs
 were occasioned by the petitioner’s operations. But there is real
 evidence to the contrary, all the witnesses having deponed, that
 until the side ditch was made, no breach ever happened in the
 same place. The witnesses also swear positively, that unless those
 ditches had been made, the breach never could have happened.

Robert

Robert Edie, after describing the situation of the new ditches, and the nature of the breach in 1792, 'depones, That when the
'deponent was in Cruivie, there was no cross ditch at that
'place, and when a spate came, the skin or surface of that
'swampy-ground rose to a certain height with the water, and
'*then the water run over the whole of the Cruivie Inch land;*
'but there never was any breach in the lead-brae near the place
'where the present breach has happened.' And again, he 'de- — p. 2. C, D.
'pones, That it is by means of the new ditch being cast, and
'getting a communication with the cross ditch, that the water
'is diverted from the mill-lead.'

John Mack 'depones, That by means of the new ditch being — p. 3. C, D.
'cast, and getting communication to the cross ditch, the water is
'diverted from the lead. Depones, That unless there had been
'ditches there the breach would not have happened; *but the wa-*
'*ter would run over the head of the brae.*'

James Walker 'depones, That unless the cross ditch and new — p. 6. B.
ditch had been cast, he thinks that the breach could not have hap-
'pened, as *the water could not have got vent.*' And he farther de-
'pones, 'That in his opinion the breach in question has been oc-
'casioned by the water coming from the lead below the ground
'on the side of it, owing to the water from the lead running a-
'way the thin mud below the surface, by which the skin or sur-
'face would fall down, and be carried off.'

When this breach happened, it is said in the petition, 'That
'from the same feeling which had actuated the former te-
'nants of Cruivie Inch, the petitioner sent his servants to re-
'pair it.' But this is a very inaccurate representation of the
fact. The object of the former tenants, was to prevent the
water from overflowing their lands. But, after the main drain,
and the cross and side ditches were so deepened, as to be lower
than the channel of the mill-lead, the petitioner, instead of
assisting to repair the breach, would have kept it open, if the
draining of his lands had been the only object; because, by doing
so, he would have completely drained his own grounds below
the breach, although this would have been accompanied with
the total annihilation of the mill. The petitioner's induce-
ment was, if possible, to prevent a complaint to the Sheriff,
which was then threatened; and, therefore, instead of sending a
servant or two to assist the tenant of Hay's mill in repairing the
breach, his servants, with his whole horses and carts, and several
other

other persons, were employed in that work, although to little or no purpose.

Proof, p. 24. A, B. William Greig, a servant of the petitioner's, mentions the gradual operation of the water, which appears first to have communicated with the side-ditch below the surface, and then to have carried away the margin of the lead altogether; and 'depones, 'That after the breach happened, the deponent was employed by 'the defender some days, one day at a time, in endeavouring to 'repair said breach, along with the defender's brother, and some 'other people, who, the deponent thinks, were employed by the 'defender: That John Greig, miller, was also there working 'some days; but he does not know whether he came on his master's account or no: That the first time the deponent was at 'said work, they got the water stopped; *but, at this time, the surface was unbroke*: That when the deponent was afterwards employed in endeavouring to repair said breach, *after the surface was broke*, he, and the others employed, were not able to stop the water from leaving the lead, it having come out below what they had replaced; and they left it in that way: That two of his master's carts were employed one day, from after breakfast till near evening, having two people to fill, and two to drive, in driving materials for repairing the said breach.'

After the petitioner's attempts to remedy the breach had proved unsuccessful, the Sheriff authorised the respondents to employ people for that purpose; but the result was the same as before.

—p. 26 G, H. Andrew Crammond 'depones, That he was employed some
p. 27. A, B 'time last winter, by the pursuer John Greig, in attempting to 'repair the breach in dispute; and he was at that time told by 'John Greig's miller, that his master had got the Sheriff's warrant for doing so. Depones, That besides the deponent, there 'were four people employed at making said repair: That they 'began in the morning to prepare materials for it; and some 'time after breakfast they went to the breach, where they continued in endeavouring to repair it for the whole day; and they 'did not get their dinner till after they came to John Greig's in 'the gloming: That they did not let the water out at the intake 'before they began to repair: That, by dinner-time that day, 'they had repaired the breach so much as made the mill go: That 'they could not find a foundation to erect any thing upon in the 'breach, as the water was coming out so rapidly at the breach: 'That

‘ That he, and the others employed, were not able to repair the
 ‘ breach altogether, as a quantity of water always continued to
 ‘ boil up from the bottom of the breach behind them, which
 ‘ they did not try to find out from whence it came; nor did
 ‘ they attempt to stop it, having only endeavoured to fill up the
 ‘ flap.’

Robert Mitchell, miller to the respondent John Greig, ‘ de-Proof, p. 14. A. B.
 ‘ pones, That he remembers, about Martinmas, of the defender^C
 ‘ and his servants endeavouring to repair the present breach:
 ‘ That the deponent assisted them part of two days; *but did so*
 ‘ *of his own accord, and was not desired by his master.* De-
 ‘ pones, That he remembers of his master, John Greig, inform-
 ‘ ing him during last winter, that he had got the Sheriff’s war-
 ‘ rant for repairing said breach: That the deponent has been re-
 ‘ pairing at said breach seven different days since that time, and
 ‘ two of said days he was at it the whole day: That Robert Coutt,
 ‘ the lead-driver, was also employed at said work all these times,
 ‘ besides others; and his master’s two sons were also sometimes
 ‘ employed.’

Alexander Watson, day-labourer, ‘ depones, That he was em- — p. 13. C. D.
 ‘ ployed some time last winter by the pursuer, John Greig, along
 ‘ with Andrew Crombie, a preceding witness for the defender,
 ‘ and others, in attempting to repair the breach in dispute: That
 ‘ besides the deponent, there were four people employed in ma-
 ‘ king the repair: That they began in the morning to prepare
 ‘ materials for it; and some time after breakfast they went to the
 ‘ breach, and continued thereat till about sunset, when they came
 ‘ to John Greig’s to their dinner: That they did not complete
 ‘ the repair so as to keep the whole water in the mill-lead, as a
 ‘ quantity of water always continued to boil up in the breach;
 ‘ and before they left it the water was running over the top of
 ‘ the repair.’

After all, it was found necessary to call in the assistance of
 a person skilled in such works, who, with seven or eight
 men, and the petitioner’s servants and carts, were employed
 to transport earth and clay to make up the bank on the south
 side of the mill-lead; and this was inclosed by fir planks of
 ten or twelve feet long set on end, and covered with earth and
 seals. Nevertheless, the remedy is far from being complete, as
 it is almost impossible, from the soft and spongy nature of the
 C foil,

foil, to prevent a communication between the mill-lead and the ditches made by the petitioner.

The Sheriff, *after visiting the subjects*, ' found, That the breach
' made in the mill-lead belonging to the said Robert Stewart, and
' possessed by the said John Greig, was occasioned by the ditch
' cast by the said William Heron on the south side of the said
' mill-lead; and that the said Robert Stewart and John Greig
' have sustained damage thereby,' &c.

The petitioner contended, that he had done no more than he was authorised to do for the improvement of his farm; and that, as Mr Anstruther, his landlord, approved of his proceedings, it would be proper to make him a party; and this was ordered by the Sheriff.

Mr Anstruther accordingly was cited, and gave in a paper, stating, ' That he did not consider himself as at all interested in
' William Heron's (the petitioner's) operations, *by which damage*
' *has been done to Mr Stewart's mill, &c.* as these were carried on
' without any knowledge or content of the respondent, *and exe-*
' *cuted by William Heron's servants in an improper and insufficient man-*
' *ner,* seemingly with an intention of founding him in a pretence
' of improvement to the farm. *Had the respondent been consulted, he*
' *would certainly have got the water banked off in a proper manner,*
' *and would have taken care that no damage should have ensued to his*
' *neighbours.* So far therefore from the respondent's protecting William
' Heron in his unwarrantable conduct, he thinks himself well founded in
' a claim against him on that account.'

Why this part of the proceedings has been altogether omitted in the petition, your Lordships will readily judge.

The Sheriff afterwards allowed the respondents to give in a state of the damages sustained by them; and this having been done, the petitioner, who could not dispute the amount, although it exceeded L. 130 Sterling, preferred a bill of advocacy, which was passed, and came before the Lord Justice-Clerk Ordinary. His Lordship, after advising a condescendence and answers, appointed the parties to be heard; and this having been done, his Lordship pronounced the interlocutor which is now brought under review, in the following terms:

July 9. 1795.

' Having heard parties procurators, finds, That the proprietor
' of Hay's mill has been in possession of a lead to his mill for
' time immemorial: Finds, That the proprietor of the lands of
' Cruivie,

* Cruivie, and his tenants, are not intitled, by any *opus manufactum*,
 * to prejudice that lead: Finds, That, by the side-drains being
 * made too near the mill-lead, the water has been withdrawn from
 * it; and therefore repels the reasons of advocacy, and remits
 * the cause to the Sheriff, in common form.'

To this interlocutor his Lordship adhered, after advising a full
 representation and answers; and he discharged all further repre-
 sentations. Dec. 9. 1795.

After the foregoing detail, it will not be necessary to use many
 words in answering the petition; because, although ingenious and
 elaborate, it is quite unauthorised by the circumstances of the
 case.

It is admitted, that, by immemorial possession, the respondents
 have right to the mill-lead, and, consequently, that in general nei-
 ther the proprietor nor tenant of the contiguous lands could le-
 gally divert the water from it.

But it is said that the petitioner and his predecessors in the lands
 of Cruivie have been in the immemorial usage of opening drains
 for the cultivation of their property; and therefore, although
 some damage might have been occasioned by the petitioner's ope-
 rations, the respondents have no title to complain.

The answer to this argument is sufficiently obvious. For, 1st,
 It is not the fact, that those possessing the lands of Cruivie before
 the petitioner, ever opened drains so as to divert the water from
 the mill-lead. It is evident, that until the year 1782, when Mr
 Anstruther became proprietor of Cruivie, the water from the mill-
 lead, even when it overflowed the lands of Cruivie in time of
 spate, could not be carried off in any other way than by the mill-
 lead itself, to which it returned when the water in the mill-lead
 became lower.

2^{dly}, It never was and never could be necessary for draining
 the lands of Cruivie, that the water in the mill-lead should be
 diverted from it, and carried through the lands of Cruivie by
 means of the ditches made by the petitioner. No doubt, if
 the petitioner was at liberty to carry the whole water in these
 grounds in a direct line from the intake to the lower end of the
 lands of Cruivie, and to empty it into the tail-lead of the mill, the
 lands of Cruivie, as well as those of Kinnear and St Ford, would be
 greatly improved; and the respondent Mr Stewart has at all
 times declared his readiness to concur with the neighbouring pro-
 prietors

prietors in any plan of that kind, upon his getting an indemnification for his mill, which in that manner would be rendered entirely useless. In the same manner, too, by carrying off the water through the cross ditch where the breach happened, that part of Cruivie Inch which is to the eastward of the cross ditch, would be protected from inundations. But as long as the mill-lead remains in its present situation, it must be the interest of the tenants of Cruivie, as well as that of the proprietors and possessors of the mill, that as much of the water as the mill-lead can contain shall follow its ordinary course, instead of being carried away in any other manner.

The averment therefore in the petition, that the respondents were attempting to prevent the tenant of Cruivie Inch from making the lawful and ordinary use of his farm, is altogether erroneous. The respondents never thought of preventing the petitioner from carrying on any operations in his own farm, for the purpose of draining it. But it is no wise necessary for that purpose, unless in the way and manner above explained, that he should introduce the whole water from the mill-lead into the lands of Cruivie, which, instead of draining, must have a quite different effect upon them.

Your Lordships have seen, how Mr Anstruther, who, with equal attention to his own interest, is more judicious in pursuing it, took care to avoid the danger which the petitioner afterwards fell into; and this, by forming the drain on the south, as well as the cross ditches, in such a manner as to prevent any communication between them and the mill-lead; and it is evident, that if the petitioner either had abstained from making the side-ditch altogether, or if he had kept it and the cross ditches at a sufficient distance from the mill-lead, he might have completely drained his grounds of the whole water which was collected in them; but he had no right and no interest to drain the respondent's mill-lead, which he in fact did, or would have done, by the operations which are here complained of, if proper means had not been taken to prevent it.

A great deal is said of the breaches of the mill-lead in former times, and of their being repaired by the tenant of the mill, although in general they were nearly opposite to the cross ditches made in the lands of Cruivie, long before the petitioner became the tenant of these lands. But the drains made by the former pos-
fessors

lessors of Cruivie were altogether different in their nature and effect from those which the petitioner has thought fit to make. They were only intended to discharge the water after it had been collected in Cruivie Inch. The most solid parts of the ground were chosen for the purpose ; and as often as any breach was discovered it was immediately and easily repaired, the tenants of Cruivie giving their assistance ' to keep the water off their own grounds.'

The petitioner's operations, on the other hand, have been so contrived, as to make a communication unavoidable between the mill-lead, and the side and cross ditches. And these again have been so enlarged in width and deepness, that after a communication has taken place, it is scarcely possible to preserve the banks of the mill-lead, or to repair them after they are broken down.

But, indeed, it is only necessary on this point to appeal to the consequences which have followed from the petitioner's operations, Until Mr Anstruther enlarged what was called the land-stank, which had been made by Robert Edie, the water which was collected in Cruivie Inch could only for a short while overflow those grounds, until the water in the mill-lead had subsided ; and at all these times the mill-lead itself was full of water ; and even after Mr Anstruther had finished the works undertaken by him, so great care was taken to prevent the communication between the current of water in the mill-lead, and that in the cross ditches, that no damage ever ensued. Accordingly it is not said, that at any one period, before the commencement of the petitioner's lease, the mill-lead was deprived of water. In these circumstances, it would have been foolish in the extreme, if the respondents, or their predecessors, had entered into any dispute with the former occupiers of Cruivie Inch, nor would they have entered the lists with the petitioner, if it had been in their power to avoid it.

In some of the pleadings before the Lord Ordinary, it was said, that the drains made by the petitioner were injurious to the respondents in two points of view, 1st, By taking away the water from the mill-lead, where it was needed ; and 2^{dly}, By returning it into the tail-lead of the mill, where it prevented the mill from going. From this, the petitioner has endeavoured to argue, as if the chief, if not the only subject of controversy,

D

was

was his right to discharge the water collected within Cruivie Inch into the tail-lead of the mill. But the respondents will not follow the petitioner in this argument. What the determination of the question would be, if it were to be tried, the respondents will not pretend to anticipate. There are no *termini habiles* for it, in the action now depending. And the Lord Ordinary's interlocutors are properly confined to the question which was brought before the Sheriff, viz. Whether the petitioner could, for any purpose whatever, divert the water from the mill-lead, in which it had flowed time past all memory? And the only reason for mentioning the other question appears to be, that the petitioner found it more easy to frame a plausible argument upon it, than upon the point which was the proper and only subject of the present litigation.

As to the proposal which has been made for regulating the water in the mill-lead by a side sluice, the following answers will readily occur: *1st*, There is no action for trying how far the respondents are obliged to erect such a side sluice. *2dly*, The petitioner being only a tenant, has no right to bring such an action, and his landlord Mr Anstruther has explicitly disavowed all his proceedings. *3dly*, If Mr Anstruther had brought such an action, the respondents would have answered, that they were intitled to possess their mill and mill-lead, as they had done for time immemorial, without being at the expence of any alteration, in order to meliorate the contiguous property. *4thly*, If the respondents had the *will*, they had not the *power* to make such an alteration; the mill-lead flowing for about half a mile through grounds which belong to other proprietors. The only place where the respondent Mr Stewart is proprietor on both sides of the mill-lead, is for a small space immediately above the mill; where, on account of the lowness of the ground, nothing can be done to improve the mill-lead.

The respondents have only farther to notice an observation made upon the Bench, when the petition was appointed to be answered. It was said, that a method had been contrived in some of the canals lately made through the western parts of Scotland, to facilitate the course of the water, and to increase its effect on mill-machinery, which might with propriety be used in this case, so as to prevent disputes between the parties. As to this, the respondents can only say, that, so far as it is in their power, without

out bringing additional expence on themselves, they will readily listen to any plan which can be proposed, for the purposes which have been mentioned. But they are altogether strangers to the invention here alluded to, and they believe the petitioner and his learned counsel are no less so. However, these matters will be properly adjusted before the Sheriff, to whom the cause has been remitted. At present, the only question is, Whether the respondents are intitled to recover the damage occasioned to them by the petitioner's operations? and upon this it is surely unnecessary to use more words.

In respect whereof, &c.

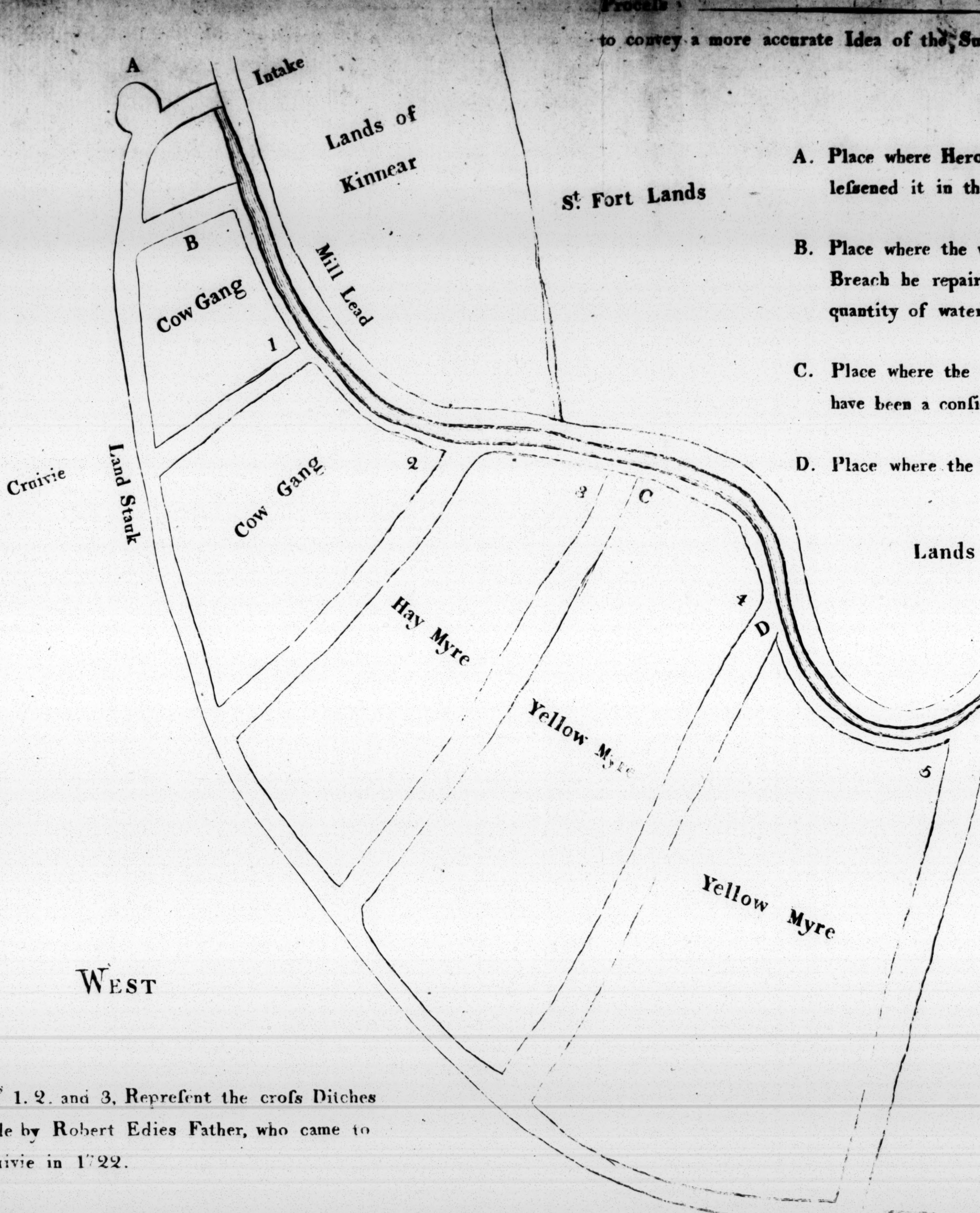
R O. CRAIGIE.

Interlocution 22 June 1796

The Lords having advised this Petition with the Answers thereto, they find the claim of damage relevant. Remit to the Lord Ordinary to examine the same and proceed farther in the cause as to him shall seem just.

The following Rough Sketch of the Lead
Process :

to convey a more accurate Idea of the Su



A. Place where Heron
lessened it in the

B. Place where the
Breach he repaired
quantity of water

C. Place where the
have been a confi

D. Place where the

Lands

N.^{os} 1. 2. and 3, Represent the cross Ditches
made by Robert Edies Father, who came to
Cruvie in 1722.

N.^{os} 4 and 5 Represent the cross Ditches made by Mr. Anstruther
before Heron became Tenant, who prolonged them, as is here Represented,
into the Ditch parallel to the Mill lead made by himself, which last operation
occasioned the Injury complained of.

the Lead of Hays Mill, with the contiguous Grounds, was sometime ago produced in
It is made without any attention to a Scale or dimensions, and merely
of the Subjects in dispute, than the Plan Engraved by the Petitioner.

where Heron dug a Lint hole, which increased the discharge of water by the Land Stank, and
it in the Mill Lead.

where the water broke through in consequence of Herons having dug a Ditch across — This
be repaired when it happened in 1790 or 1791, but not EFFECTUALLY, as a considerable
of water goes off there now.

where the former Breaches in the Lead alluded to in Robert Edies deposition, and said to
en a considerable DISTANCE TO THE WESTWARD (which is the case) happened.

where the Breach complained of happened.

